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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

CAUSE NO. 22-0585

IN THE SUPREME COURT OF TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

MARK SELF AND BIRGIT SELF,
Respondents.

On Petition for Review from the Second Court of Appeals,
Fort Worth, Texas; Cause No. 02-21-00240-CV

RESPONDENTS' BRIEF ON THE MERITS

Nicholas P. Laurent
State Bar No. 24065591
laurent@barronadler.com
Andrew York
State Bar No. 24066318
york@barronadler.com
Blaire A. Knox
State Bar No. 24074542
knox@barronadler.com
BARRON, ADLER, CLOUGH & ODDO, PLLC
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 | (512) 478-6022 (fax)

ATTORNEYS FOR RESPONDENTS
MARK SELF & BIRGIT SELF

IDENTITY OF PARTIES AND COUNSEL

Petitioner:	Texas Department of Transportation ("TxDOT" or "Petitioner")
Trial Counsel:	Catherine Fuller State Bar No. 24107254 catherine.fuller@oag.texas.gov Assistant Attorney General Transportation Division P.O. Box 12548 Austin, Texas 78711-2548 Telephone: (512) 936-1116 Facsimile: (512) 936-0888
Appellate Counsel:	Philip A. Lionberger Assistant Solicitor General State Bar No. 12394380 Philip.Lionberger@oag.texas.gov Office of the Texas Attorney General P.O. Box 12548 (MC 059) Austin, Texas 78711-2548 Telephone: (512) 936-1700 Facsimile: (512) 474-2697
Respondents:	Mark Self & Birgit Self ("the Selfs" or "Respondents")
Trial and Appellate Counsel:	Nicholas P. Laurent State Bar No. 24065591 laurent@barronadler.com Andrew York State Bar No. 24066318 york@barronadler.com Blaire A. Knox State Bar No. 24074542 knox@barronadler.com BARRON, ADLER, CLOUGH & ODDO, PLLC 808 Nueces Street

	Austin, Texas 78701 Telephone: (512) 478-4995 Facsimile: (512) 478-6022
Non-Appealing Defendant:	T.F.R. Enterprises, Inc. ("TFR")
Trial Counsel:	Jennifer D. Aufricht State Bar No. 01429050 jaufricht@thompsoncoe.com Sean R. Hicks State Bar No. 24072479 shicks@thompsoncoe.com THOMPSON COE 700 N. Pearl Street, 25th Floor Dallas, Texas 75201-8209 Telephone: (214) 871-8200 Facsimile: (214) 871-8209
Non-Appealing Defendant:	Lyellco, Inc. ("Lyellco")
Trial Counsel:	Catherine L. Kyle State Bar No. 1177860 ckyle@chmc-law.com Scott G. Marcinkus State Bar No. 24099703 smarcinkus@chmc-law.com CHAMBERLAIN MCHANEY, PLLC 901 S. MoPac Expressway Bldg. I, Suite 500 Austin, Texas 78746 Telephone: (512) 474-9124 Facsimile: (512) 474-8582

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STATEMENT OF THE CASE

Nature of the Case:	The Plaintiffs, Mark Self and Birgit Self, sued the Texas Department of Transportation (TxDOT) under the Texas Tort Claims Act and for inverse condemnation after Plaintiffs' trees were removed from the Plaintiffs' property during a TxDOT tree and brush removal project off FM 677 in Montague County. CR.180-86; 210-25.
Trial Court:	The Honorable Jack A. McGaughey, presiding in the 97th Judicial District Court of Montague County, Texas.
Trial Court Disposition:	The trial court denied TxDOT's plea to the jurisdiction on July 7, 2021. CR.468. (App. A).
Court of Appeals Disposition:	Justice Bassel, joined by Justices Wallach and Walker, in a memorandum opinion on rehearing reversed the portion of the trial court order denying the plea to the jurisdiction on the inverse condemnation claim, but affirmed in part and reversed in part the denial of the plea on the TTCA claim. *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094 (Tex. App.—Fort Worth Apr. 28, 2022, pet. filed) (mem. op.) (Apps. C & D). Motions for rehearing and rehearing en banc were denied.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the appeal presents a question of law that is important to the jurisprudence of the state, and because it involves the construction of a statute.

ISSUES PRESENTED

1. Whether the record presents fact issues as to the elements of the immunity waiver in Section 101.021 of the Civil Practice and Remedies Code, such that TxDOT's plea to the jurisdiction on the Selfs' Tort Claims Act claim was properly denied?

2. Whether Section 101.021 of the Civil Practice and Remedies Code—assuming proximate causation by an employee is established—requires that the damage at issue arise from the operation or use *by an employee in close physical proximity to and direct control of* a motor-driven vehicle/equipment, or simply that the damage arise from the operation or use of a motor-driven vehicle/equipment?

3. Whether the record presents fact issues as to the elements of the Selfs' inverse condemnation claim, such that TxDOT's plea to the jurisdiction on that claim was properly denied?

I.
STATEMENT OF FACTS

The record contains extensive evidence that (a) acts and omissions of TxDOT employees proximately caused the damage at issue, (b) the damage arose from the use of motor-driven equipment and vehicles, and (c) a direct nexus exists between the "injury negligently caused by a governmental employee" and the operation of such equipment and vehicles.

A. The Selfs own property fronting FM 677.

The Selfs own the real property at issue, which is located in Montague County on FM 677 (the "Property"). CR 180–81; 228; 240–44.

B. TxDOT hired TFR to clear brush and remove trees along FM 677.

In January 2020, TxDOT and T.F.R. Enterprises, Inc. ("TFR") entered into Contract No. 12194216 for "Tree and Brush Removal in Montague County" (the "Contract"). CR 331–438. Among other things, the Contract called for:

- "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the trunk" [CR 335]
- Quantities for tree removal "shall be *identified* by the engineer prior to work being performed" [CR 337]
- "For trees *marked* for removal, the diameter is determined by . . ." [CR 338]
- At formal pre-construction conference: (a) "discussed perform work within *designated work spaces only*," (b) "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the

trunk," (c) "trimming/brush removal . . . from *right-of-way line to right-of-way line*" [CR 256–57]

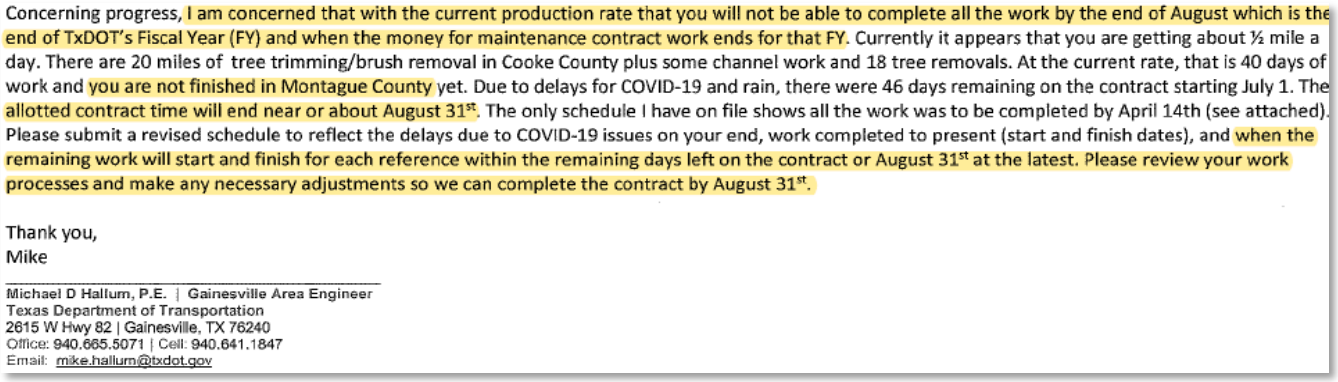
- "Perform tree and brush removal and trimming from *right of way line to right of way line* or other widths and locations shown on the *plans*. . . . Remove trees of various diameters as shown on the *plans*, or as directed." [CR 275; 359]

The contract price for the Contract was approximately $336,000 [CR 431], with possible adjustments up or down depending on the number of trees actually removed by TFR. To that end, the pre-construction conference notes included:

- "Coordinate the day after work performed to get item quantities established for payment" [CR 264]
- "Mark additional trees to be removed (not on plans) and get quantities to Chris for $ approval" [*Id.*]

C. TFR fell behind in its work on behalf of TxDOT.

However, in July 2020, TxDOT expressed concerns that TFR was not moving quickly enough:



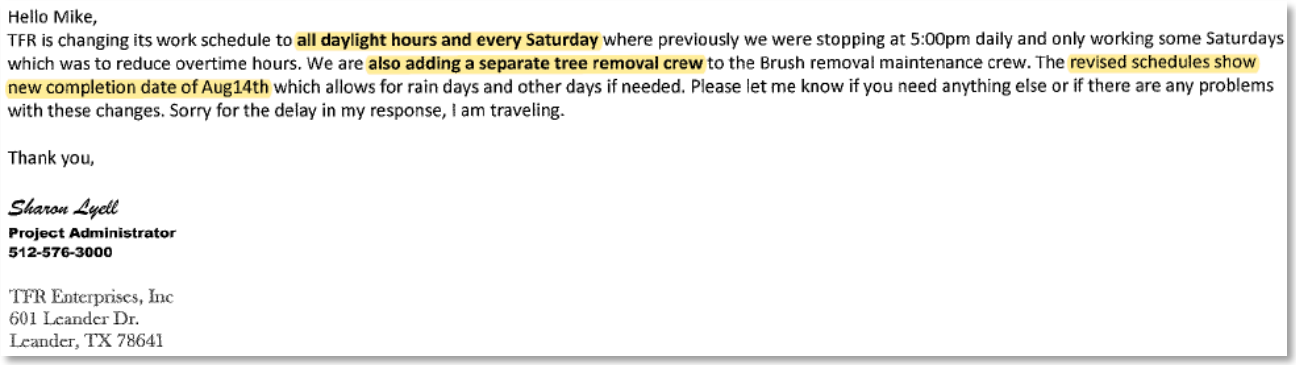
Concerning progress, I am concerned that with the current production rate that you will not be able to complete all the work by the end of August which is the end of TxDOT's Fiscal Year (FY) and when the money for maintenance contract work ends for that FY. Currently it appears that you are getting about ½ mile a day. There are 20 miles of tree trimming/brush removal in Cooke County plus some channel work and 18 tree removals. At the current rate, that is 40 days of work and you are not finished in Montague County yet. Due to delays for COVID-19 and rain, there were 46 days remaining on the contract starting July 1. The allotted contract time will end near or about August 31st. The only schedule I have on file shows all the work was to be completed by April 14th (see attached). Please submit a revised schedule to reflect the delays due to COVID-19 issues on your end, work completed to present (start and finish dates), and when the remaining work will start and finish for each reference within the remaining days left on the contract or August 31st at the latest. Please review your work processes and make any necessary adjustments so we can complete the contract by August 31st.

Thank you,
Mike

Michael D Hallum, P.E. | Gainesville Area Engineer
Texas Department of Transportation
2615 W Hwy 82 | Gainesville, TX 76240
Office: 940.665.5071 | Cell: 940.641.1847
Email: mike.hallum@txdot.gov

CR 279.

In response, in an email dated July 16, TFR agreed to start working all daylight hours six days per week, and added a new crew with apparently minimal (if any) experience with this type of project:



Hello Mike,
TFR is changing its work schedule to **all daylight hours and every Saturday** where previously we were stopping at 5:00pm daily and only working some Saturdays which was to reduce overtime hours. We are **also adding a separate tree removal crew** to the Brush removal maintenance crew. The revised schedules show new completion date of Aug14th which allows for rain days and other days if needed. Please let me know if you need anything else or if there are any problems with these changes. Sorry for the delay in my response, I am traveling.

Thank you,

Sharon Lyell
Project Administrator
512-576-3000

TFR Enterprises, Inc
601 Leander Dr.
Leander, TX 78641

CR 279.

D. TFR hired Lyellco to help with the TxDOT project.

This effort to fast-track the project to beat an artificial budgetary deadline led to TFR executing a subcontract with Lyellco Inc. ("Lyellco") in July 2020. CR 440–45. According to public Secretary of State records, the president and registered agent of Lyellco is Sharon Lyell, who signed the email above as TFR's project administrator. Thus, this was not an arms-length relationship.

E. Defendants removed 22 trees from the Selfs' Property.

Days later, on July 23, Lyellco personnel removed the twenty-two trees at issue from the Property.[1]

[1] At least 30 trees were removed in total. Of those, at least 22 were located either entirely or partially within the Property's boundaries (and outside of the public right-of-way). CR 228; 232–38.

TFR has confirmed in discovery that the tree damage "arose from" the use of chainsaws and a Bobcat provided by Lyellco, and a "bucket truck" provided by TFR:

INTERROGATORY NO. 3: Please identify the equipment used to remove trees on Plaintiffs' Property, on any properties that immediately adjoin Plaintiffs' Property, and on any FM677 public right-of-way adjacent to Plaintiffs' Property. In answering this interrogatory, please state if any such equipment is motor-driven.

ANSWER:

Lyellco used its own chainsaws and Bobcat, and also used a bucket truck provided by TFR. Also, see bates labeled documents: DEF_TFR_000264-274, which are incorporated by reference.

CR 292.

Lyellco's work records confirm the same:

ACTIVITY	QTY	RATE	AMOUNT
Tree Removal -July 20-24 3 Man Work Crew Truck, Trailer, Bobcat. Chainsaws (4 work days at $1,500/day)	4	1,500.00	6,000.00
	BALANCE DUE		**$6,000.00**

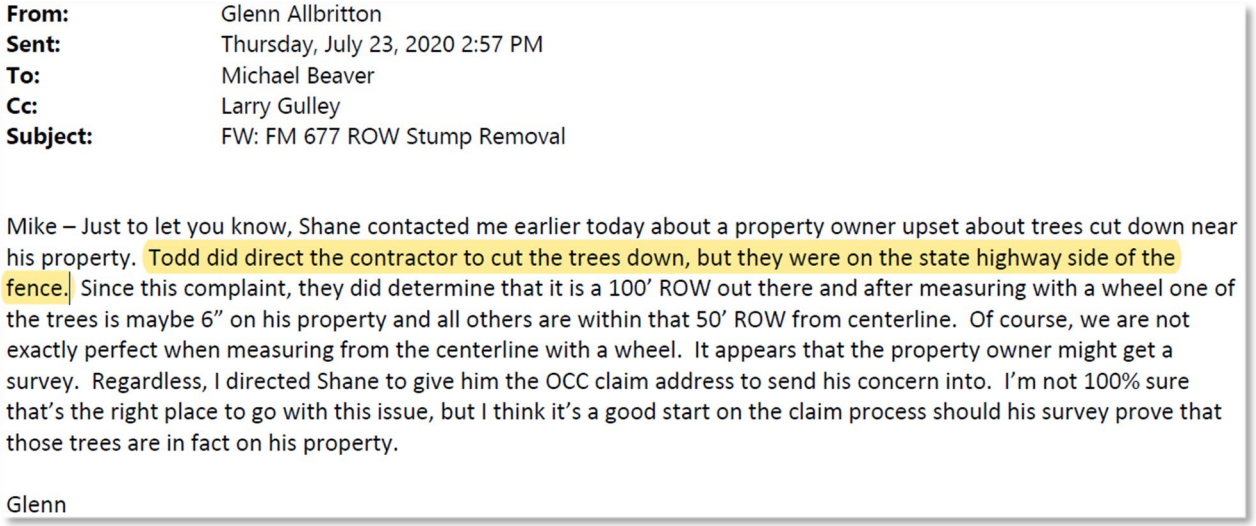
CR 296.

F. TxDOT instructed TFR and Lyellco on what trees to remove.

Finally, there is ample evidence that one or more TxDOT employees—including Todd Russell—directed TFR and/or Lyellco to clear "fence to fence." CR 229 (Self Declaration: "After learning of the tree destruction, I contacted TxDOT, as set forth in more detail in Exhibit 4. I was informed by TxDOT personnel that the

right-of-way was not surveyed, and the contractors were simply instructed to 'clear everything between the fences.'").

This admission against interest by TxDOT is confirmed by contemporaneous TxDOT emails, showing that Mr. Russell provided the instructions for which trees should be removed:



From: Glenn Allbritton
Sent: Thursday, July 23, 2020 2:57 PM
To: Michael Beaver
Cc: Larry Gulley
Subject: FW: FM 677 ROW Stump Removal

Mike – Just to let you know, Shane contacted me earlier today about a property owner upset about trees cut down near his property. Todd did direct the contractor to cut the trees down, but they were on the state highway side of the fence. Since this complaint, they did determine that it is a 100' ROW out there and after measuring with a wheel one of the trees is maybe 6" on his property and all others are within that 50' ROW from centerline. Of course, we are not exactly perfect when measuring from the centerline with a wheel. It appears that the property owner might get a survey. Regardless, I directed Shane to give him the OCC claim address to send his concern into. I'm not 100% sure that's the right place to go with this issue, but I think it's a good start on the claim process should his survey prove that those trees are in fact on his property.

Glenn

CR 307.

This "fence-to-fence" instruction is further confirmed by TxDOT's discovery responses:

Request for Interrogatories No. 6:
Please identify any efforts TxDOT or T.F.R. took to ensure it was only clearing or maintaining trees or vegetation within the FM677 public right-of-way and not on private property.

OBJECTION(S):

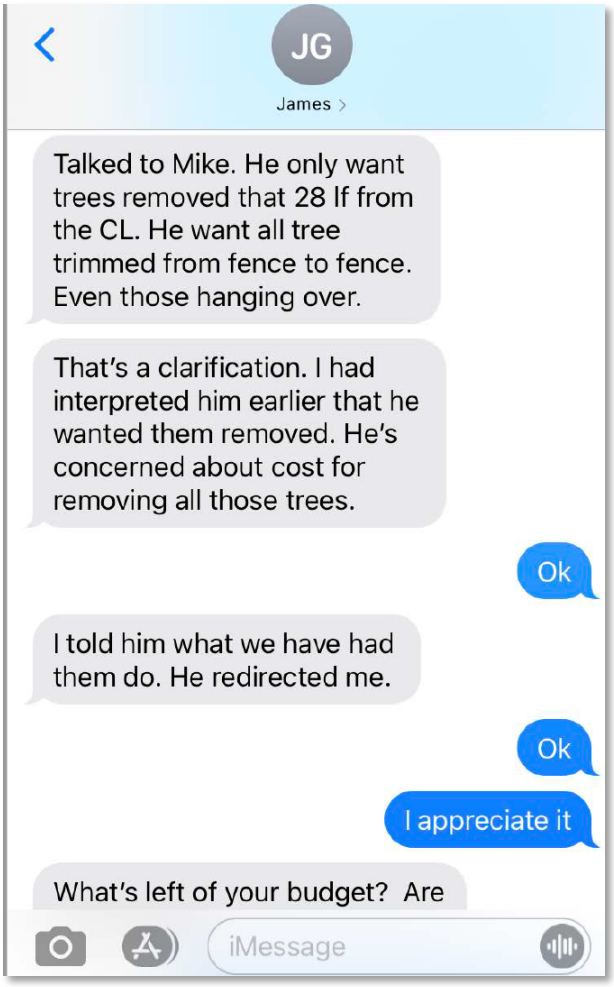
Overly Broad
TXDOT objects on the basis that the request is overly broad, vague and ambiguous and is beyond the scope of discovery allowed by the Texas Rules of Civil Procedure. Plaintiffs' interrogatory amounts to nothing more than a fishing expedition which is prohibited under Texas law. Further, TxDOT objects to this discovery request because the discovery can be obtained from some other source that is more convenient, less burdensome, or less expensive. Tex. R. Civ. P. 192.4(a).

Subject to and without waving the foregoing objection(s) and/or assertion(s) of privilege, TxDOT responds as follows:

Fence-to-fence has been the standard method of determining the right of way. Plans were provided and areas were discussed at the pre-work meeting. Plans of the pre-work meeting are produced with TxDOT's *Response to Request for Production of Documents*. There were also phone communications between T.F.R. and TxDOT inspector.

CR 286.

Moreover, contemporaneous communications between Mike Hallum (TxDOT Area Engineer), James Gibbs (TxDOT Gainesville), and Todd Russell (TxDOT Inspector) confirm that internal confusion, budget concerns, and casual definition and alteration of work scopes contributed to the problem:



CR 299.

The above text chain confirms that *after* the Selfs' trees were removed, TxDOT altered its work scope instructions to limit *removal* of trees to twenty-eight linear feet on either side of the roadway center line, with *trimming* from fence to fence, which was evidently an update to the instructions that were in place the day the Selfs' trees were removed. Sensibly, the twenty-eight-foot requirement[2] would require the crew to use a tape measure or other technique to confirm the limits of the

[2] The full right of way width was 60 feet, or 30 feet from the centerline.

tree-removal zone, which they had evidently never done on this project. But the change came too late to benefit the Selfs.

Finally, TxDOT has confirmed in interrogatory answers that "no surveys were conducted in association with this project," and "TxDOT is not aware of any communications with Plaintiff prior to clearing or maintaining of trees or vegetation on this project." CR 287–88; 228–30.

II.
SUMMARY OF ARGUMENT

Sovereign immunity is often a tough pill to swallow for an injured plaintiff. But when a statute waives immunity in a particular situation, a plaintiff should be able to rely on the plain language of that statute.

The statute at issue in this case must be construed as written, meaning that two questions control: (a) was the damage proximately caused by acts or omissions of a TxDOT employee?, and (b) did the damage arise from operation or use of motor-driven vehicles or equipment? While this inquiry involves examining foreseeability and the nexus between the employee's negligence, the machine operation, and the injury, the statute does *not* require that a government employee be physically or directly operating the machinery at issue.

The Texas Tort Claims Act waives immunity for claims involving:

> "property damage . . .

> *proximately caused* by the *wrongful act or omission or the negligence of an employee* acting within his scope of employment if . . .
>
> the property damage . . . *arises from* the operation or use of a *motor-driven vehicle or motor-driven equipment* [and] the employee would be personally liable to the claimant according to Texas law."

As set forth in more detail below, both of those elements are demonstrated by the record evidence. At the very least, fact issues as to each element required the denial of TxDOT's plea to the jurisdiction.

TxDOT's argument on appeal boils down to this—*because the individuals physically operating the motor-driven equipment and vehicles were not TxDOT employees, TxDOT remains immune*. But such a requirement simply does not exist in the plain language of the statute, and the line of cases cited by TxDOT does not create such a requirement and is otherwise distinguishable. Rather, those cases correctly confirm that courts should not "engraft extra-statutory requirements not found in a statute's text," and that "the "statute itself—and only the statute—provides the governing rule of decision."

TxDOT interprets the Tort Claims Act to require that a TxDOT "employee" must be physically operating the vehicle/equipment for the immunity waiver to apply. The court of appeals also discussed numerous cases affirming liability where "direct control" existed, which the court of appeals defined as "both close physical

proximity to the equipment while it is in operation and direction so precise that the State tells the third party in physical control of the equipment which direction and how far to move." Op. on Reh'g at 31.

But no party has asserted that those requirements are stated *in the plain language of the statute*—the Act merely requires that a TxDOT employee's "wrongful act or omission or the negligence" be the "*proximate cause*" of the damage. And it is axiomatic that there may be more than one proximate cause of a given loss. Here, one of those causes was the acts and omissions of TxDOT employees,[3] and a direct nexus connects those acts and omissions to the machine operation and injury at issue.

Finally, as TxDOT notes, after purchasing the property in 2017, the Selfs replaced the fence and the new fence was placed approximately two to three feet inside of the prior fence line. TxDOT's implication is apparently that the Selfs are somehow to blame for the tree removal. But it is undisputed that the Selfs were under no obligation to keep the fence at any specific location, and any effort by TxDOT to alert property owners that this work was coming or otherwise to coordinate with adjacent owners (which common sense would dictate doing before removing mature trees) would have avoided the tree destruction that occurred in this

[3] Moreover, based on TxDOT's actual control and contractual control rights, there remain fact issues as to whether TFR and Lyellco (and their respective personnel) satisfy the definition of "employee" under the Tort Claims Act.

case. More importantly, this argument by TxDOT goes, if anywhere, to the merits of the case and not to the jurisdictional questions to be decided in this appeal.

III.
ARGUMENT

A. Standard of Review.

"Whether a court has subject-matter jurisdiction is a question of law, which [appellate courts] review de novo." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

"In reviewing a grant or denial of a plea to the jurisdiction, [appellate courts] determine whether the plaintiff's pleadings, construed in favor of the plaintiff, allege sufficient facts affirmatively demonstrating the court's jurisdiction to hear the case." *Id.* In considering a plea to the jurisdiction, pleadings are construed in favor of the plaintiff and courts look to the pleader's intent. *Tex. Dep't of Parks & Wildlife v Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

A plea to the jurisdiction is a dilatory plea that can challenge the face of the pleadings or the existence of jurisdictional facts. *See Miranda*, 133 S.W.3d at 226–27. When a plea to the jurisdiction goes beyond the pleadings and includes evidence intended to challenge the existence of jurisdictional facts, the trial court must exercise its discretion to decide "whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227.

"If the evidence creates a *fact question* regarding the jurisdictional issue, then the trial court *cannot grant* the plea to the jurisdiction." *Id.* at 227–28 (emphasis added); *see also Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) ("[W]hen a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence, the standard of review mirrors that of a traditional summary judgment: all the evidence is reviewed *in the light most favorable to the plaintiff* to determine whether a genuine issue of material fact exists . . . .") (emphasis added).

B. The Texas Tort Claims Act waives immunity for Plaintiffs' tort claims.

1. Overview of Tort Claims Act.

Section 101.021 of the Texas Tort Claims Act provides:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> >
> > (B) the employee would be personally liable to the claimant according to Texas law

TEX. CIV. PRAC. & REM. CODE § 101.021 (emphasis added). The Act also confirms that: "Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter." *Id.* § 101.025(a).

In addition, the Act defines "employee" as "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." *Id.* § 101.001(2).

2. Because acts and omissions of a TxDOT employee proximately caused the damage, and the damage arose from operation or use of motor-driven vehicles and equipment, the Act applies and TxDOT is not immune.

Section 101.021 could easily have included language requiring that the equipment be physically operated (or directly operated, or any other formulation) by an employee, but it did not. Indeed, the *LeLeaux* opinion cited by TxDOT states that (a) the statute itself simply does not say whose operation is required, and (b) what *is* required is a *nexus* between the injury proximately caused by the negligence of a government employee and the operation or use of the motor-driven vehicle:

> The phrase, "arises from", requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment. While the statute does not specify whose operation or use is necessary—the employee's, the person who suffers injury, or some third party—we think the

> more plausible reading is that the required operation or use is that of the employee.

LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992).

LeLeaux involved a parked school bus in which nobody was present other than the injured sixteen-year-old plaintiff. *Id*. The bus was empty, the engine was not running, and the student was attempting to enter through the rear emergency door, where she hit her head on the top of the door frame. *Id.*

The Court noted that the bus was "not in operation," was "parked, empty, with the motor off," and ultimately was "nothing more than the place where Monica happened to injure herself." *Id.* at 51. The Court therefore held that the injury did *not* "arise out of the use or operation of the bus," and therefore immunity was not waived under the Tort Claims Act. *Id.* at 52.

The court's discussion of "whose operation is necessary" under the statute (quoted above) only considered the "employee's, the person who suffers injury, or some third party." The *LeLeaux* decision had nothing to do with distinguishing *employee*-operators from *independent-contractor*-operators. Rather, the Court was considering whether an injured *plaintiff's* "operation" of the vehicle could be sufficient. The Court focused on the existence of a nexus, which it found lacking based on the specific facts presented: "The phrase, 'arises from', requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment." *Id.* But such a

nexus is decidedly present in this case, where TxDOT specifically instructed TFR/Lyellco on which trees to remove to carry out TxDOT's project, directed "fence to fence" removal, and failed to follow contract requirements that TxDOT mark the trees designated for removal.

The Court did not hold anything with respect to operation of equipment by an independent contractor, and certainly not in a situation where the nexus between the "injury negligently caused by a governmental employee" and the machine-operation was so clear. Also notably, the *LeLeaux* decision was a 5-4 vote, and the dissent begins: "Once again the majority has rewritten a statute to suit its fancy." *Id.* at 54.

The above comment from the 1992 dissenting opinion was recently embraced in a unanimous decision in *PHI, Inc. v. Texas Juv. Just. Dep't*, 593 S.W.3d 296 (Tex. 2019). In *PHI*, an unoccupied government cargo van rolled backwards down an incline into a grounded helicopter. *Id.* at 299. The government-employee driver parked the van but failed to engage the emergency brake, and the van rolled into the privately owned helicopter. *Id.* The trial court denied the Department's plea to the jurisdiction, but the intermediate court reversed, holding that the Act is "is limited to cases where the vehicle was in 'active' operation or use 'at the time of the incident.'" *Id.* at 301 (*citing Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015)). The Supreme Court reversed again, and found that immunity was waived.

In explaining its decision, the *PHI* court discussed both *LeLeaux* and *Ryder*, which involved a collision between two large trucks that occurred while a deputy sheriff was attempting to pull over one of the trucks. *Id.* at 304. The *Ryder* opinion included a sentence purporting to require "active" operation at the time of the incident, but the Supreme Court in *PHI* clarified and confirmed that "no court has the authority, under the guise of interpreting a statute, to engraft extra-statutory requirements not found in a statute's text." *Id.* at 305; *see also Sem v. State*, 821 S.W.2d 411, 416 (Tex. App.—Fort Worth 1991, no writ):

> The striking feature about this [Section 101.021] when it is broken down into its component parts, is that it neither requires that the State own nor that it directly use the vehicle or property that causes the death. We are not permitted by statutory construction to add additional language to the statute unless it is necessary to give effect to clear legislative intent.

The same rule applies here and confirms that when a TxDOT employee proximately causes an injury that arises from operation of motor-driven equipment, the Act does not *also* require that the employee be physically operating (or near) the equipment. And no appellate decision does add—or could even have the authority to add—such a requirement to the Tort Claims Act. *See id.* (sentence in *Ryder* concerning "active" operation was "not intended to replace the statute or add elements to it, nor could it have done so. *The statute itself—and only the statute—provides the governing rule of decision*.") (emphasis added).

In responding to the Selfs' argument that the physical/direct-operation-by-employee requirement is not found in the Act itself, the court of appeals noted: "As the opinion reflects, neither our standard nor the holdings of the cases that we cite for its formulation are created from whole cloth. The myriad opinions that we analyzed have their genesis in the following statement in the Texas Supreme Court's opinion in *LeLeaux*." Op. on Reh'g at 32 n.6. And those opinions *do* follow *LeLeaux*'s lead. But *LeLeaux* has very little to say about the situation faced by the Selfs because *LeLeaux* did not involve an independent contractor, nor did it involve individuals who were following instructions from a government employee when they destroyed the property at issue.

In addition, the requirement of "close physical proximity to the equipment"—part of the more "lenient" line of cases as characterized by the court of appeals—makes little sense in the digital era, when instructions and directions from people more than twenty feet away are often more consequential than those given on site. And again, such a requirement is not found in the statute.

3. TxDOT's slippery slope concerns are unfounded.

The straightforward reading of the statute for which the Selfs advocate does not create blanket government liability for *all* vehicle/equipment accidents on government jobs. Rather, a defendant must show that a TxDOT employee *proximately caused* the damage at issue, meaning the acts or omissions of TxDOT

employees were the cause in fact of the damage, and that such an outcome was foreseeable. TxDOT can avoid findings of proximate cause in many situations by structuring its contracts and actual working relationships accordingly. For example, TxDOT in this case could have confirmed in the contract that TFR/Lyellco was responsible for confirming which trees were in the right of way. Instead, TxDOT retained the responsibility for designating and marking trees (but didn't mark them) and directed that the wrong trees be removed. *See* CR 307 excerpted *supra* ("Todd did direct the contractor to cut the trees down").

As the court of appeals noted: "TxDOT is suffering the consequences of how it drafted the contract at issue and, perhaps, the instructions issued by its employees. TxDOT could have protected itself in the contract by limiting the determinations that it took on itself to make." Op. on Reh'g, 44 n.8.

4. The record evidence confirms that TxDOT employee(s) proximately caused the injury.

The first requirement for application of the Act's waiver of immunity is that the property damage must be "proximately caused" by the "wrongful act or omission or the negligence of an employee." TEX. CIV. PRAC. & REM. CODE § 101.021. Here, the evidence establishes that (a) TxDOT did not mark the trees to be removed with an "X" as required by the contract documents and its internal procedures, (b) TxDOT performed no surveys, and failed to create a written plan identifying the trees to be removed, (c) TxDOT did not communicate with the Selfs, and (d) TxDOT

specifically instructed TFR/Lyellco to remove trees "fence to fence" despite not measuring the right-of-way, and generally doing *nothing* to confirm whether the fence was located on the right-of-way line, or further into the Selfs' property. These actions and omissions by TxDOT constitute proximate causes of the damage at issue.

In addition, even assuming for argument that the Act requires an "employee" to be physically operating the equipment/vehicle at issue, fact issues remain and additional discovery is needed with respect to who exactly was operating the equipment and whether or not those individuals and entities were "employees" as defined by the Tort Claims Act. In particular, to the extent TxDOT retained the "legal right to control" the "details" of TFR/Lyellco's work, as suggested by the emails and text messages cited above, then those individuals and entities may satisfy the definition. *See, e.g.*, CR 279; 299; 307. There is already evidence sufficient to create a fact issue on the "employee" issue—including the extremely detailed nature of the contract itself, and the numerous examples of actual control exerted by TxDOT personnel (both formally and informally) as described above and discussed in more detail in Respondents' Response to Petitioner's Petition for Review.

5. The record evidence confirms that the property damages arose from the operation or use of motor-driven vehicles and equipment.

The evidence produced by the Defendants conclusively establishes that motor driven vehicles and equipment—including a bucket truck, bobcat, and chainsaws—were used to remove the trees. These facts are undisputed. *See* TxDOT Pet. for

Review at 2 ("Lyellco's employees removed trees from the Selfs' property with (1) a chainsaw and Bobcat provided by Lyellco and (2) a bucket truck provided by T.F.R.").

6. As a result, the Act applies and TxDOT's immunity is waived.

The evidence is conclusive that (a) the damage was proximately caused by acts or omissions of one or more TxDOT employees (including Todd Russell), and (b) the damage arose from operation or use of motor-driven vehicles or equipment. At the very least, fact issues exist regarding both issues, which is sufficient to mandate denial of TxDOT's plea to the jurisdiction.

Denying TxDOT's plea to the jurisdiction is also consistent with common law and common sense. *See, e.g., Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220, 222 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("The question is: Does a company that hires an independent contractor to clear land have a duty to correctly identify the land? We hold it does."). When the State hires someone to destroy something, it should be held responsible when it designates the wrong target, whether or not such designation is made while physically standing in close proximity.

C. The elements of the Selfs' inverse-condemnation claim are supported by record evidence, or alternatively, fact issues exist for each element.

The court of appeals held that proof was lacking as to whether "TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way or was

substantially certain that any trees on their private property would be cut down," and that the Selfs failed to show TxDOT was "aware that its action [would] necessarily cause physical damage to certain private property, and yet determine[d] that the benefit to the public outweigh[ed] the harm caused to that property." Op. on Reh'g at 50.

The court of appeals cited the *Zetterlund* case as an example where the requisite intent existed, noting that in that case "employees of the City of Dallas were informed by a landowner that the City's contractors were using his property without permission but continued that use for months after being informed and after agreeing to compensate the landowner for the use." Op. on Reh'g at 51-52 (citing *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 837 (Tex. App.—Dallas 2008, no pet.)). The court of appeals continued: "*Zetterlund* held that there was evidence that damage to the landowner was substantially certain to result from the City's and their contractor's acts because they continued to use the property after being informed that they did not have permission to do so." *Id.*

In this case, TxDOT's actions and omissions made it substantially certain that the trees in questions would be destroyed in furtherance of a public project, and TxDOT failed to follow its own procedures for marking trees and confirming that all trees removed were in the right of way. To the extent TxDOT was not aware that the trees in question were privately owned, that ignorance is a result of TxDOT's

acts and omissions as discussed above, its failure to communicate with property owners in advance, and its rapid removal of the trees before the owner had time to respond to the problem. These circumstances were under TxDOT's control (and not the Selfs') and should not negate the validity of the Selfs' claim. As stated above, when the State hires someone to destroy something, it should be held responsible when it designates the wrong target—even if it doesn't "intend" to destroy the wrong target.

IV.
PRAYER

FOR THESE REASONS, Respondents, Mark and Birgit Self, respectfully request that this Court grant their petition for review, affirm the trial court's order, reverse contrary portions of the decision of the court of appeals, and grant such other and further relief to which Respondents are justly entitled.

Respectfully submitted,

BARRON ADLER CLOUGH & ODDO, PLLC
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 – Telephone
(512) 478-6022 – Facsimile

By: */s/ Andrew F. York*
Nicholas P. Laurent (SBN 24065591)
laurent@barronadler.com
Andrew F. York (SBN 24066318)
york@barronadler.com
Blaire A. Knox (SBN 24074542)
knox@barronadler.com

ATTORNEY FOR RESPONDENTS,
MARK SELF & BIRGIT SELF

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Brief contains 4,455 words, and is in compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(B). Further, I certify that on March 29, 2023, I transmitted a copy of the foregoing to the following counsel by electronic mail:

Catherine Fuller
Assistant Attorney General
Transportation Division
P.O. Box 12548
Austin, Texas 78711-2548
O: (512) 936-1116
F: (512) 936-0888
catherine.fuller@oag.texas.gov
Counsel for Petitioner

Philip A. Lionberger
Assistant Solicitor General
State Bar No. 12394380
Philip.Lionberger@oag.texas.gov
Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Telephone: (512) 936-1700
Facsimile: (512) 474-2697
Counsel for Petitioner/Cross-Respondent

Jennifer D. Aufricht
Sean R. Hicks
THOMPSON COE
700 N. Pearl Street, 25th Floor
Dallas, Texas 75201-8209
jaufricht@thompsoncoe.com
shicks@thompsoncoe.com
Counsel for T.F.R. Enterprises

Catherine L. Kyle
Scott G. Marcinkus
CHAMBERLAIN MCHANEY, PLLC

901 S. MoPac Expressway
Bldg. I, Suite 500
Austin, Texas 78746
ckyle@chmc-law.com
smarcinkus@chmc-law.com
Counsel for Lyellco, Inc.

/s/ Andrew F. York
Andrew F. York

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Catherine L. Kyle	11778600	ckyle@chmc-law.com	3/29/2023 3:05:14 PM	SENT
Sean Hicks	24072479	shicks@thompsoncoe.com	3/29/2023 3:05:14 PM	SENT
Andrew York	24066318	york@barronadler.com	3/29/2023 3:05:14 PM	SENT
Blaire Knox	24074542	knox@barronadler.com	3/29/2023 3:05:14 PM	SENT
Nicholas Laurent	24065591	laurent@barronadler.com	3/29/2023 3:05:14 PM	SENT
Chappell Moore		Chappell.Moore@oag.texas.gov	3/29/2023 3:05:14 PM	SENT
Scott Marcinkus	24099703	smarcinkus@burgermeyer.com	3/29/2023 3:05:14 PM	SENT
Jennifer Dechamplain Aufricht	1429050	jaufricht@thompsoncoe.com	3/29/2023 3:05:14 PM	SENT
Catherine Fuller		Catherine.Fuller@oag.texas.gov	3/29/2023 3:05:14 PM	SENT
Amanda J.Glasscock		aglasscock@barronadler.com	3/29/2023 3:05:14 PM	SENT

Associated Case Party: Texas Department of Transportation

Name	BarNumber	Email	TimestampSubmitted	Status
Philip Lionberger		Philip.Lionberger@oag.texas.gov	3/29/2023 3:05:14 PM	SENT
Valeria Alcocer		valeria.alcocer@oag.texas.gov	3/29/2023 3:05:14 PM	SENT

Associated Case Party: Lyellco, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Landa Diaz		ldiaz@chmc-law.com	3/29/2023 3:05:14 PM	SENT
Elizabeth Keefe		ekeefe@chmc-law.com	3/29/2023 3:05:14 PM	SENT